

Saving Old Inspection Reports: Document Retention and Destruction Post-Enron

BY JOHN M. LAWLOR

Over the past twenty years of my career in fire protection, I learned that having information was always better than not having it. Being able to access an old proposal or inspection report frequently helped to settle a difference with a customer, where not having had the information might have made the company look less professional, or worse yet, required me to acquiesce to a potentially unreasonable customer demand.

If you're like me, you've kept years and years of inspection records, service reports, and expired contracts for fear of the day when you'll need that one dog-eared, yellowed, barely-legible document to help defend you from a fire loss or some other kind of legal challenge. Because of the litigious nature of the fire protection business, we live in fear of discarding old records. But is it really the best strategy for your company?

“No Good Deed Goes Unpunished”

As a reward for our saving ways, we frequently provide our enemies with the very bullets that they will use to shoot us in a court of law. Under the legal doctrine of *discovery* we are required to turn over all documents, correspondence, and other evidentiary material to the plaintiff's attorneys to assist them in preparing their case—*their case against us!* It's right about this time that we lose our sense of humor about our technician's unintelligible handwriting, or our inspector's lack of detail-orientation when filling out his paperwork. But by then, it's too late.

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An employee's slowness to follow up on a deficiency or a tech's inadvertent failure to check a box on an inspection form will be met with accusations of “negligence” and “breach of contract” from the other side. And because we've provided our accusers with the “smoking gun” in the form of an incorrectly prepared report, for example, we've made the case against us that much more compelling.

While this article should serve as a reminder to all of us to make sure that our people are documenting their processes accurately and following up on deficiencies in a timely way,

the best prepared documents can still hurt us if the other side has unfettered access to too much of our information. What we retain and how long we retain it could be the difference between a large settlement and prevailing in your own defense. That's where a good document retention and destruction policy may be able to help us.

Document Retention and Destruction Policies

Document retention and destruction policies are not new, per se, but have gained notoriety recently in light of the scandals that broke at high-profile businesses like Enron, Arthur Andersen, WorldCom, and Adelphia Cable, where document destruction was deemed to be a deliberate attempt to obstruct investigations into, among other things, inappropriate accounting practices.

You do not have to be a Fortune 500 corporation to benefit from a well-designed document retention and destruction policy. There are four important steps that every business should undertake when implementing their policy:

- **Create the Policy:** Establish a document retention schedule that includes realistic document life cycles, recognizing that different types of documents require different retention/destruction standards. Where it might be legal and acceptable to dispose of old bank statements every three years, other documents such as deeds and mortgages should be retained forever. Regulated professions like auditors and accountants have established guidelines for document retention. And while the fire protection industry lacks a consistent standard, some NFPA standards reference the length of time that inspection and certification-related documents must be retained by the system owner.
- **Train on the Policy:** Employees and key third parties, such as vendors and customers, should be trained thoroughly on your policy. A copy of the retention policy should be published in your company handbook and should be periodically reviewed with all personnel in a position to generate or handle documents. Copies of the policy should also be shared with your customers and suppliers, and relevant sections of the policy should be included on forms and in proposals.

• **Implement the Policy:** After you've formulated and publicized your retention policy, use it. But remember to apply your policy consistently; the issue that caused the ruination of Arthur Andersen was not their document destruction policy itself, but rather their destruction of documents inconsistent with the policy that were later deemed to be relevant to the government's investigation. And don't lose sight of the fact that "document" does not apply to printed documents only, but includes electronic correspondence such as e-mail, and information stored on magnetic or optical back up media, as well. Deliberate care must be taken by the policy administrator to ensure that information is removed consistently from all file storage locations, including employee workstations and laptops.

• **Implement Compliance Reviews and Audit the Policy Periodically:** No business is static; employees come and go; situations change. For this reason it is imperative that you review compliance with your plan periodically. It is important to remember that documents retained by employees and third parties, in violation of the policy, are discoverable. This will not necessarily invalidate your policy so long as you have made a reasonable effort to educate employees on your document destruction requirements. Courts will look for a good-faith effort to enforce your policy, and will accept that there are limits to what can be enforced by the employer.

What does the law say about document retention?

In 2002, the Sarbanes-Oxley Act was enacted in direct response to what congressional investigators viewed as Arthur Andersen's "criminal intent" to knowingly destroy documents in an attempt to impede the government's investigation of Enron. The Sarbanes-Oxley Act broadened the power of federal obstruction statutes and modified existing criminal obstruction statutes by imposing penalties for the destruction of documents related to actual or "contemplated" investigations conducted by federal departments or agencies. It also replaced the term "corruptly destroys" with "knowingly destroys" to broaden the scope of the law to include all purposeful destruction of documents, regardless of whether the destruction is legitimate or not.¹

It should be pointed out that document retention and destruction is still on the cutting edge of trial law. Although no court has yet ruled on the issue, the new statute might render a person criminally liable who destroys a document *simply because he or she thinks the document might someday create*

*difficulties for the company in either criminal or civil litigation.*² And, because no federal investigation has to be actually pending or imminent to render destruction of documents illegal, any ad hoc destruction of documents, even if done innocently to "clean house," may be viewed by prosecutors with a heightened degree of suspicion.³

If litigation against your company is ever threatened or a subpoena demanding production of certain documents is ever served on your company, consult your attorney immediately. Your counsel will advise you whether it is prudent to continue [or suspend] your destruction policy.

There is nothing illegal about purging old records from our businesses. The best way for us to reduce the heightened risk associated with the ordinary destruction of old and out-dated corporate records is to implement a document retention and destruction policy that forbids the inconsistent handling of company records and educate all of our employees about the policy. ▽

1. Stanger, Andrew J., "Document Destruction after Enron: Interpreting the New Sarbanes-Oxley Obstruction Statutes," *Business Law Journal*, University of California, Davis School of Law, May 1, 2005, p. 5.

2. O'Melveny & Myers LLP, "Document Retention/ Destruction Policies in Response to Sections 802 and 1102 of the Sarbanes-Oxley Act of 2002," August 14, 2003, p. 3.

3. *Ibid*, p. 3.

Other Sources:

1. Travers, Sherry R., "Avoiding Document Destruction Claims," *Information Security Product Destruction News*, May 12, 2003, pp. 1-2.

2. Willard, Mark A., "Document Destruction," [http://www.sideroad.com/Legal_Advise/Blue Boulder Internet Publishing](http://www.sideroad.com/Legal_Advise/Blue_Boulder_Internet_Publishing), St. Williams, Ontario, Canada, 2005.

3. Logan, Debra, et al., "Court's Ruling Should Relieve Document Retention Burden," <http://www.gartner.com/>, June 3, 2005, pp. 1-2.

4. Blomquist, William K., "Guidelines for Corporate Document Retention and Destruction," *International Lawyers Network (ILN)*, Vol. 2, Issue 3, March 28, 2003, pp. 1-5.

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